No. 75-755

Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1975

28 EAST JACKSON ENTERPRISES, INC.,
Petitioner,

vs.

P. J. CULLERTON, Individually and as Cook County Assessor, and BERNARD J. KORZEN, Individually and as Treasurer and Ex-Officio Collector of Cook County,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered August 8, 1975.

OPINIONS BELOW

The opinions of the Court of Appeals for the Seventh Circuit and of the United States District Court for the Northern District of Illinois have not been officially reported. Both slip opinions are set out in the Appendix. Because it is cited in the District Court's opinion, that

Court's opinion in the related action, 72 C 1373, is also set out in the Appendix.

JURISDICTION

The Court of Appeals rendered its judgment and opinion on August 8, 1975 and denied a timely filed petition for rehearing on October 9, 1975. This petition is filed within 90 days from October 9, 1975. By its orders of October 16 and November 7, 1975, the Court of Appeals stayed its mandate until November 24, 1975. Rule 41(b), Federal Rules of Appellate Procedure. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether the Court of Appeals erred in holding that an action at law for money damages under 42 USC §1983 against Cook County, Illinois officials in their individual capacities for longstanding systematic discrimination in the assessment of real property for tax purposes is barred by 28 USC §1341? Basically, the question becomes, can taxpayers who suffer from such discrimination use §1983 in an action for money damages against County assessing officials to right long standing abuses occasioned by discrimination in execution of the tax laws?

Whether the Court of Appeals erred in reversing a preliminary injunction entered by the District Court and dismissing plaintiff's action for injunctive relief under 42 USC §1983 when plaintiff had no remedy at law in the state court and its remedy in equity in that court was at best uncertain and a mere prediction based on decisions rendered after the suit was filed?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT XIV

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

FEDERAL STATUTES PROVIDE IN PERTINENT PART

TITLE 28 USC

§ 1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State. June 25, 1948, c. 646, 62 Stat. 932.

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

TITLE 42 USC

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979.

STATEMENT OF THE CASE

Plaintiff, 28 East Jackson Enterprises, Inc., brought a civil rights action in the District Court under 42 USC §1983 and 28 USC §1343(3), and under 28 USC §1331 seeking injunctive relief against the defendant Collector of Cook County, a declaratory judgment, and money damages against the Collector and his fellow County official, the Assessor of Cook County, in their individual capacities.

Plaintiff's amended complaint[1] alleged gross discrimination of long standing in the assessment of real estate in Cook County by the defendant Assessor. Specifically it alleged that notwithstanding the Constitution and laws of Illinois required all property to be assessed uniformly at full fair cash value, real property, since not later than

[1] Plaintiff's prayer for injunctive relief in its original complaint and its motion for a preliminary injunction to restrain the Collector from proceeding to judgment for its 1972 taxes were rendered moot by the entry of judgment by the Circuit Court of Cook County while the motion was pending before the District Court. An amended complaint and motion to enjoin sale of the taxes to satisfy the judgment were filed, against which the defendants' original motion to dismiss under 28 USC §1341 was allowed to stand.

1958 when he took office, had been assessed by the defendant Cullerton so that property generally in Cook County was assessed far below the statutory level of 100% of fair cash value; and, further, so that wide variations, i.e. from less than 5% to over 120%, of fair cash value existed between assessments of individual properties. Plaintiff alleged that the longstanding discriminatory assessment scheme and methods were well known to the defendant officials, their results being officially reported by the Illinois Department of Local Government Affairs in its annual reports on real estate tax assessments. It further alleged that in 1972 the general level of equalized assessment in Cook County was 40% of fair cash value while its property was assessed at 100%, requiring it to pay taxes of $82,000 rather than $30,000 if assessed as property generally was assessed.

The amended complaint also alleged that plaintiff had no adequate remedy at law, being without and unable to borrow funds to pay its taxes in full, a condition precedent to an action in the State Court for a refund of the illegally assessed moiety. Such procedure is the only remedy at law in Illinois.[2]

The defendant County officials filed a motion to dismiss under 28 USC §1341.

Plaintiff moved for a preliminary injunction under Rule 65, Federal Rules of Civil Procedure, and after an evidentiary hearing the District Court entered an injunction

[2] Payment of taxes in full under protest and filing of objections to the annual application by the County Collector for judgment. *Cf.* Chapter 120, Illinois Revised Statutes §675, 716. In the related case, the District Court found, App. 14a, that the denial of interest on refunds *inter alia*, rendered such remedy at law *not* "plain, speedy and efficient".

on January 23, 1974, restraining the Collector from selling the subject property for taxes. Appendix 8a. The Court found, *inter alia*, that the taxpayer was unable to pay its taxes in full, had no plain, speedy and efficient remedy under Illinois law, would suffer irreparable harm if its taxes were sold, and had a reasonable likelihood to prevail ultimately. It further found that the levying of taxes which have a discriminatory effect between taxpayers can violate the equal protection clause of the 14th Amendment to the United States Constitution. App. 9a.

The defendants offered no evidence and relied on their motion to dismiss and the "integrity of the tax bills".

The defendant officials appealed under 28 USC §1292 and the Seventh Circuit reversed, Swygert, J., dissenting in part. The majority held that 28 USC §1341 barred federal jurisdiction since it was ". . . reasonably certain that Illinois courts would entertain a suit for injunction when a taxpayer establishes that he lacks the funds to comply with the statutory remedy of payment under protest." App. 6a. The Court of Appeals ordered the entire action dismissed including the declaratory and damage claims, stating that the "Complaint, fairly read, seeks solely to suspend or restrain the collection of (plaintiff's) 1972 real estate taxes." App. 2a.

The dissent held that the majority's "reasonable certainty" was based on a mere prediction of what Illinois law would be and did not approach "a certainty within the contemplation of §1341." App. 6a, 7a.

The Court of Appeals reached its decision solely on jurisdictional grounds under §1341. It did not, therefore, consider the propriety of the preliminary injunction and the evidence supporting it heard and considered by the District Court at the adversary hearing.

ARGUMENT SUPPORTING REASONS FOR GRANTING THE WRIT

I.

THE DISMISSAL OF THE CIVIL RIGHTS ACTION FOR DAMAGES CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

Discrimination in the administration of tax laws in the assessment of property may result in the deprivation of equal protection, *Sunday Lake Iron* v. *Wakefield*, 247 U.S. 350, 352 (1918):

> "The purpose of the equal protection clause of the 14th Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20, 35, 37, 52 L.ed. 78, 87, 88, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757. It is also clear that mere errors of judgment by officials will not support a claim of discrimination. There must be something more,—something which in effect amounts to an intentional violation of the essential principle of practical uniformity."

See also *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441 (1923). The Supreme Court of Illinois has so held, adding that it also constitutes a taking of property without due process of law. *People* v. *Union Station Co.*, 383 Ill. 153, 163 (1943):

> "If, as contended by appellant, its property was not assessed on the same basis of debasement as all other

property in the taxing district, such an assessment amounts to a denial of the equal protection of the law, and taking property without due process of law contrary to the provisions of the fourteenth amendment to the constitution of the United States. (*Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 74 L.ed. 1107; *Hanover Fire Ins. Co.* v. *Carr*, 272 U.S. 494, 71 L.ed. 372; *Sioux City Bridge Co.* v. *Dakota County*, 266 U.S. 441, 67 L.ed. 340.)"

But it is not an actionable denial of equal protection unless there is shown to be present in the maladministration of a state statute fair on its face[1] an element of intentional or purposeful discrimination resulting in unequal treatment to those entitled to be treated alike. *Snowden* v. *Hughes*, 321 U.S. 1, 8 1943). In *Snowden*, commenting on such treatment, this Court stated (pg. 9):

> "Another familiar example is the failure of state taxing officials to assess property for taxation on a uniform standard of valuation as required by the assessment laws. It is not enough to establish a denial of equal protection that some are assessed at a higher valuation than others. The difference must be due to a purposeful discrimination, which may be evidenced, for example, by a systematic under-valuation of the property of some taxpayers and a systematic over-valuation of the property of others, so that the practical effect of the official breach of law is the same as though the discrimination were incorporated in and proclaimed by the statute. (Citing cases) Such discrimination may also be shown to be purposeful, and hence a denial of equal protection, even though

[1] Uniformity in tax assessments is mandated by the Illinois Constitution of 1970. The Revenue Act of 1939, Chapter 120, Illinois Revised Statutes §482, et seq., governs assessment and taxation of real estate and is admittedly a fair and equitable state statute.

> it is neither systematic nor long-continued. *Cf. McFarland* v. *American Sugar Ref. Co.*, 241 U.S. 79, 60 L.ed. 899, 36 S.Ct. 498, *supra*."

See also *Sunday Lake Iron* v. *Wakefield*, 247 U.S. 350, 353.

It is undisputed that longstanding, systematic discrimination exists in the assessment of real estate in Cook County, Illinois. The Complaint[4] alleges, Paragraph 18, App. 135, that it has existed under the defendant Assessor since he took office in 1958; the witness Garber, Supervisor of Assessments for the State, testified at the hearing in the District Court that the range in assessment in Cook County ratios[5] varies from 5% to over 120% and that such gross inequalities have existed since 1952. Ratio Studies, officially prepared and published annually by the State Department of Revenue for over 20 years, have shown such discrimination in assessments between the many types of properties in Cook County and between individual properties within these types.

The socio-economic consequence of such longstanding discrimination is apparent. The District Court remarked in his earlier opinion:

> "Disparity in the administration of tax laws can cause chronic and perhaps irremediable blight in a large metropolitan area such as Cook County." App. 16a.

An analysis of the State ratio studies for the most recent five years, plaintiff's Exhibit 8 received at the hearing,

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[4] References are to the Amended Complaint.

[5] The ratio of assessed valuation to fair cash value. Uniform assessment at 100% of fair cash value, defined as market value, was the law since enactment of the Revenue Act of 1939.

(Appellees Appendix 54, *et seq.*) reveals that in fact the greatest discrimination exists in the blighted inner city areas of Chicago.

Given the magnitude of the abuses, their long standing character and the tenure in office of the defendant Cullerton, wilful, systematic, purposeful discrimination in the administration of the tax laws cannot be gainsaid, thereby clothing such malfeasance with the stamp of official policy. Nor is the 1972 tax assessment an anomaly for this plaintiff.[6]

Since this Court's decision in *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972), property rights come within the purview of 42 USC §1983.[7] The statute authorizes "an action at law, suit in equity, or other proper proceeding for redress." Plaintiff's action at law seeks money damages[8] against the defendants in their individual capacities and not against Cook County. *Edelman* v. *Jordan*, 415 U.S. 651 (1974) is thus not a bar. *Monroe* v.

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[6] Plaintiff filed a civil rights action for damages against these defendants, *inter alios*, for 1971 taxes which it was able to pay in full. 72 C 1373. It is still pending. It also filed an action for 1973 taxes in the same form as the suit at bar. Its assessments were the same for those 3 years and is the same for 1974 notwithstanding continuing but unavailing administrative complaints to the assessing officials. Chapter 120 Ill. Revised Statutes §§579, 593-606.

[7] Plaintiff also alleged jurisdiction under 28 USC 1331, the amount in controversy exceeding $10,000.00.

[8] Damages are sought in the amount of the excessive tax levy, viz., $52,000. Real estate taxes for 1972 became a lien on plaintiff's property on January 1, 1972, Chapter 120 Illinois Revised Statutes §697, and albeit the taxes have not been paid, plaintiff has been damaged in the amount of the excessive moiety of the lien.

Pape, 365 U.S. 167 (1961), envisions such relief, and as Judge Friendly remarked in *Eisen* v. *Eastman*, 421 F.2d 560 (C.A.N.Y., 1969):

> "The District Court's conclusion that the Civil Rights Act could not be invoked gets no support from the holding in *Monroe* v. *Pape* barring suits thereunder against municipalities. The action here was not against New York City but against Eastman (the rent control director). Actions against a government official acting under color of statutes and ordinances are what 42 USC 1983 is mainly about." (pp. 562-3)

More recently, this Court in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), has said: (at 237)

> "However, since Ex parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S.Ct. 441 (1908), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law. Ex parte Young teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he
>
> > 'comes into conflict with the superior authority of that Consitution, and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.' Id., at 159-160, 52 L. Ed. 714. (Emphasis supplied).
>
> Ex parte Young, like *Sterling* v. *Constantin*, 287 U.S. 378, 77 L. Ed. 375, 53 S.Ct. 190 (1932), involved a question of the federal courts' injunctive power, not, as here, a claim for monetary damages. While it is clear that the doctrine of Ex parte Young is of no aid to a plaintiff seeking damages from the public

> treasury, *Edelman* v. *Jordan, supra. Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U.S. 573, 90 L.Ed. 862, 66 S.Ct. 745 (1946); *Ford Motor Co.* v. *Dept. of Treasury*, 323 U.S. 459, 89 L.Ed. 389, 65 S.Ct. 347 (1945); *Great Northern Life Insurance Co.* v. *Read*, 322 U.S. 47, 88 L. Ed. 1121, 64 S.Ct. 873 (1944), damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office. *Myers* v. *Anderson*, 238 U.S. 368, 59 L.Ed. 1349, 35 S.Ct. 932 (1915). See generally *Monroe* v. *Pape*, 365 U.S. 167, 5 L.Ed.2d 492, 81 S.Ct. 473 (1961); *Moor* v. *County of Alameda*, 411 U.S. 693, 36 L.Ed.2d 596, 93 S.Ct. 1785 (1973). *In some situations a damage remedy can be as effective a redress for the infringement of a Constitutional right as injunctive relief might be in another.*" (Our emphasis supplied)

Thus, notwithstanding that this Court has clearly delineated a legal right of redress in the federal courts from systematic, intentional discrimination in the administration of state property tax laws, the Seventh Circuit has summarily denied plaintiff this right by stating, App. 2a, that plaintiff's action at law for damages against the defendants in their individual capacities is in reality a suit to "suspend or restrain the collection of its 1972 real estate taxes" and hence is barred by 28 USC §1341. Such an abridgement of the breadth of 42 USC §1983 and misconstruction both of plaintiff's complaint and the proper applicability of §1341 grant immunity to local tax officials from blatant civil rights deprivations imposed by their longstanding abuses of the taxing process, promote a favorable climate for favoritism in the administration of tax laws and are patently error. In these critical days when large cities find themselves in desperate financial straits, it is of utmost national concern that

their tax laws be administered fairly. The federal government has now a vital financial as well as socio-political interest in such proper administration. This is not an unwarranted intrusion of the federal government in a state's affairs. The District Court so remarked, App. 16a:

> "We do not view this as a case where the Federal courts may create an unseemly conflict between two sovereignties or may unnecessarily impair state functions (*Martin* v. *Creasy*, 360 U.S. 219 (1958)) but rather a case where plaintiffs have alleged a Federal cause of action which can perhaps only be remedied here. *Cf. Brown* v. *Board of Education*, 349 U.S. 294, (1955) and *Baker* v. *Carr*, 369 U.S. 186 (1962)."

At this moment in history, it is imperative that the federal courts lend their power to the rectification of the tax assessment abuses and laxity present not only in Cook County but in countless urban counties throughout the United States. See "Taxable Property Values And Assessment—Sales Price Ratios", Volume 2, Parts 1 and 2, U.S. Department of Commerce, issued October, 1973. A striking example of such inequality is found, e.g., in Newark, N.J., Vol. 2, *op. cit.*, pg. 131, wherein 25% of all single family homes are assessed at less than 56% of value, the 1st quartile, whereas 25%, the third quartile, are assessed at over 110%. No more effective remedy is at hand to correct these abuses and guarantee to the citizenry the equal protection of the laws than 42 USC §1983.

The Seventh Circuit has decided an important question of federal law contrary to applicable decisions of this Court of long standing and in a manner detrimental not only to the federally guaranteed rights of plaintiff but to the national interests at this critical time. Its decision in this "significant test case" should be reviewed by this Court and federal law settled on the point. (*Cf.*, District Court's opinion, App. 10a)

II.

THE DISMISSAL OF PLAINTIFF'S INJUNCTIVE ACTION IS CONTRARY TO THE DECISIONS IN HILLSBOROUGH V. CROMWELL, 326 US 620 (1946).

In *Hillsborough* v. *Cromwell*, 326 U.S. 620, 625, 626, this Court found in a tax discrimination suit that there was such uncertainty concerning the New Jersey remedy as to make it speculative whether the state afforded full protection to federal rights. Accordingly, it held that such uncertainty surrounding the adequacy of the state remedy justified the District Court in granting equitable relief where, pg. 628, it found it was not clear that the taxpayer had open any adequate* remedy in the New Jersey courts for challenging the assessments on local law grounds.

We submit that it is highly uncertain and at best a mere prediction that Illinois courts will afford equitable relief in the case at bar; that such uncertainty obviates the thrust of 28 USC §1341 which requires a "plain, speedy and efficient remedy" in the state courts.

At the time the within suit was filed in November, 1973, no Illinois case decided under the Revenue Act of 1939, as amended by the so-called Butler Bills in 1945, had granted equitable relief except where the tax imposed was either on exempt property or was not authorized by law. Nor has any case been decided since then granting equitable relief for a discriminatory assessment unless such a statutory or procedural irregularity existed. *Cf. Hoyne Savings and Loan Association* v. *Hare*, 60 Ill.2d 84 (1974).

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*28 USCA §384, in force in 1945, precluded suits in equity where a "plain, adequate and complete remedy may be had at law."

As noted previously, n. 6 *supra II*, plaintiff is also plaintiff in an earlier related suit, 72 C 1373, seeking money damages for 1971 taxes against, *inter alios*, the defendants Cullerton and Korzen for the same grounds as alleged in the instant suit. That action was filed in May, 1972, and jurisdiction was upheld against a §1341 motion to dismiss on January 23, 1973. App. 12a. At that time, the law in Illinois was unequivocal in denying equitable relief from assessment discrimination. In *Goodyear* v. *Tierney*, 411 Ill. 421, 427 (1952), the Court stated:

> "From the earliest decisions of this court, illustrated by such cases as *Chicago, Burlington and Quincy Railroad Co.* v. *Frary*, 22 Ill. 34, this court has manifested a reluctance to grant injunctive relief in tax matters for reasons of sound public policy as set forth in the *Frary* case. *We there stated that injunctive relief in tax matters should be afforded only where the tax itself is not authorized by law, or the tax, if itself authorized, is assessed upon property not subject to taxation.* A reading of the quoted portion of our opinion in the *Owens-Illinois Glass Co.* case as above set forth, which case was decided 85 years after the *Frary* case, shows that this court still adheres to the principles it announced in earlier times—that injunctive relief is given only where the tax is unauthorized by law or is levied on property exempt from taxation. *Injunctive relief has never been given in cases* in which there have been irregularities in levying a lawful tax or where the relief sought is *to correct an erroneous assessment or to question the size or amount of an assessment. Ames* v. *Schlaeger*, 386 Ill. 160, *Michigan Central Railroad Co.* v. *Carr*, 303 Ill. 354. (Emph. supplied)
>
> * * *
>
> Appellant's real complaint, as evidenced by a careful study of its brief and argument, is not that it was assessed but rather that it was assessed for too high

a figure. Under the principles set forth in our earlier decisions, this case, therefore, does not involve the attempted imposition of a tax unauthorized by law or an attempt to levy upon exempt property and, therefore, it would not be a proper case for injunctive relief." (pp. 428-429)

To the same point, see *Hodge* v. *Glaze*, 22 Ill.2d 294, 297 (1961) where the court said:

> "Such relief will not be granted where mere irregularities are alleged to have occurred or where the proceeding is to correct an erroneous assessment or to question its amount. (*Goodyear Tire and Rubber Co.* v. *Tierney*, 411 Ill. 421; *Lakefront Realty Corp.* v. *Lorenz*, 19 Ill.2d 415.)

U. S. and Olin Mathieson Co. v. *Department of Revenue of State of Illinois*, 191 F.Supp. 723 (1961), (judgment vacated and remanded for other reasons, 7 L.Ed.2d 90), held similarly in a suit seeking a declaration of unconstitutionality of and to enjoin the Illinois Retailers Occupational tax. Answering the §1341 argument advanced by the State, Judge LaBuy, writing for the three-judge panel, said: (pg. 726)

> "In order to resolve the contentions of the defendants in their entirety, however, we proceed to determine the efficacy of the argument that a plain, speedy and efficient remedy exists in the courts of Illinois. Such determination bears also on the exercise of judicial discretion which must guide us, as a federal court of equity, in determining whether or not we should grant or withhold a remedy which is within our equity power to give. *Toomer et al.* v. *Witsell et al.*, 1948, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460; *Great Lakes Dredge & Dock Co.* v. *Huffman*, 1942, 319 U.S. 293, 301, 63 S.Ct. 1070, 87 L.Ed. 1407. The defendants rely on *Owens-Illinois Glass Co.* v. *McKibbin*, 1943, 385 Ill. 245, 52 N.E.2d 177, to establish

that Olin Mathieson has recourse to the courts of Illinois to enjoin the tax collection without the necessity of depositing the tax moneys due. In *Goodyear Tire & Rubber Co.* v. *Tierney*, 1952, 411 Ill. 421, 427, 104 N.E.2d 222, the Illinois Supreme Court ruled that application for injunction is available only to a taxpayer when the tax is unauthorized by law, i.e., imposed when not provided for, or is levied on property which is exempt. *Owens-Illinois Glass Co.* v. *McKibbin*, *supra*, 385 Ill. at page 256, 52 N.E.2d at page 182; *Acme Printing Ink Co.* v. *Nudelman*, 1939, 371 Ill. 217, 20 N.E. 2d 277. In the instant case it is conceded by plaintiffs that Olin Mathieson is a retailer subject to the occupation tax of Illinois. Therefore, it may not invoke the remedy of injunctive relief in the courts of Illinois."

Goodyear being the law, there was no plain, speedy and efficient remedy either at law or in equity when the earlier case, 72 C 1373, was filed and jurisdiction upheld; and none on November 12, 1973 when the present case was filed, under the local rules, as a related case to 72 C 1373. *Clarendon Associates* v. *Korzen*, 56 Ill.2d 95,[10] upon which the majority rely as authority for the possibility of equitable relief in fraudulent assessment cases, *denied* equitable relief in a situation similar to that at bar. Therein a limited partnership owned low income housing subject to federal rent strictions.[11] A discriminatory tax assessment and the inability to pay the taxes in full were alleged in a suit in equity to enjoin the Collector from

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[10] *Clarendon Associates* v. *Korzen, et al*, 56 Ill.2d 95, was decided October 1, 1973. Since a petition for rehearing was filed, denied January 29, 1974, the case did not appear in the advance sheets until March 4, 1974. Counsel did not become aware of the case until after the present suit was filed when a slip opinion was furnished by counsel for defendants.

collecting the constructively fraudulent tax moiety. As a condition of granting a temporary injunction, in lieu of bond, the trial court ordered the balance of taxes paid (id., pg. 103) into a special interest bearing account and the limited partners advanced funds in the amount of taxes enjoined, the limited partnership being without funds to comply with the court's order[11].

Thus, notwithstanding the socio-economic realities of federally funded 22103 low income housing, the inability of the taxpayer to pay the constructively fraudulent portion of $109,000 on top of a proper tax of $136,000, the fact that the lower court required in lieu of bond the deposit of the full amount of the tax which required the taxpayer's limited partners to advance the funds, the *ratio decidendi* of *Clarendon* was that the remedy at law of payment in full with suit for refund was adequate and equitable relief was denied.

If it be relegated to the State courts, can plaintiff expect to be treated any differently from the plaintiff in *Clarendon* from whom the trial court required a deposit of the balance due as a condition for entering the temporary injunction, thereafter reversed on appeal? Unlike its counterpart in *Clarendon*, having no shareholders of means, should plaintiff be required to seek out an investor to buy stock in it or in desperaton pay an extortionate rate of interest to obtain the $100,000 excessive tax portion for 1972 and 1973 taxes, for which injunctions are pending? Is this the plain, speedy and efficient remedy that Congress envisioned?

Plaintiff respectfully states that the Court of Appeals either overlooked or misapprehended the foregoing and

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[11] See Briefs of counsel, Ill.Sup.Ct. No. 45561, consolidated, for facts not found in the decision but in the record.

considered not the facts and the *ratio decidendi* of *Clarendon* but mere *dicta*, i.e.:

> "There will be cases of fraudulently excessive assessments where the remedy at law will not be adequate and injunctive relief should then be available." 56 Ill. 2d at 108.

Even defendants' counsel admitted the uncertainty of remedy foreshadowed by these *dicta*: (Defendants' Brief in Court of Appeals, pg. 17)

> "Therefore, the taxpayer's right to equitable relief in Illinois is at best unaltered by *Clarendon* and at the worst uncertain."

If unaltered, it is the rule in *Goodyear;* if uncertain, it is *contra* thus Court's holding in *Hillsborough!* Further, without prescience or clairvoyance, could counsel, viewing the Illinois line of decisions in the fall of 1973 have reasonably concluded on the basis of *Goodyear* v. *Tierney*, 411 Ill. 421, that an equitable remedy existed in Illinois which could in the circumstances in which the plaintiff found itself be a plain, speedy and efficient one? Even the dissenting justices found *Clarendon*'s provisions harsh, pg. 109, and even today its thrust is equivocal. *Cf. Real Estate Tax Assessments—A Study of Illinois Taxpayers' Judicial Remedies*, 24 DePaul Law Review 465 (Winter, 1975). Therein the authors state that if a taxpayer is without funds to pay the tax resulting from an over-assessment, there is no equitable relief in Illinois court's and: (pg. 466)

> "In all likelihood, the only recourse is to find a buyer who can afford to pay the taxes. One cannot expect any probable avenue of relief in the courts unless he can first pay the taxes under protest; only then will he receive some measure of judicial review."

The authors critique *Clarendon* and *LaSalle National Bank* v. *County of Cook*, 57 Ill.2d 318 (1974) and conclude that the latter closes the door on any possible equitable relief except when the traditional elements of either property exempt from taxation or illegality of the tax are present.

The equitable relief granted in *Hoyne Savings and Loan Association* v. *Hare*, 60 Ill.2d 84 (1974), cited by the majority, was based on irregularities in the taxing procedures for 1971. Although the same overassessment was present for 1972 requiring the payment of $19,208 in taxes rather than the admittedly correct amount of $4,700, and the cases were consolidated, the Illinois court denied equitable relief in the later year, no irregularities in procedure being present. The effect of such denial was to foreclose any possible relief for the plaintiff, the time for paying the taxes in full and suing at law for refund having expired. Equity thus countenanced an irremediable loss of $15,000.

The Court of Appeals also cited *Exchange National Bank* v. *Cullerton*, 17 Ill.App.3d 392 (1974) as support for the possibility of plaintiff obtaining equitable relief in Illinois courts. We note that this decision was rendered after the suit at bar was filed, as were the decisions in *Hoyne* and *LaSalle National Bank*, and that if fairly read can in no way even imply that equitable relief could be granted to a plaintiff unable to pay its taxes in full. The complaint did not even so allege.

A former uncertainty exists as to whether Illinois courts may grant plaintiff equitable relief. The only grounds for judicial review of property tax assessments in Illinois is fraud or constructive fraud.[12] *LaSalle Na-*

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[12] The scope of review has not been altered by the new Constitution. *LaSalle National Bank*, *op. cit.*, pg. 330.

tional Bank v. *County of Cook*, 57 Ill.2d 318, 323 (1974). See also *People ex rel Nordlund* v. *Lans*, 31 Ill.2d 477 (1964). The quantum of overassessment or discrimination necessary to warrant judicial relief at law has been about 75%. (An overassessment of 71.5% in *People ex rel Munson* v. *Morningside Heights*, 45 Ill.2d 338 (1970) was deemed insufficient to warrant relief whereas 78% was sufficient in *People ex rel* v. *Am. Refrigerator Transit Co.*, 33 Ill.2d 501 (1966).) Although at the hearing on the preliminary injunction plaintiff proved an overassessment substantially in excess of 78%, nonetheless defendants stood on their motion and adduced no evidence. If on a full trial in state court the evidence showed that plaintiff's taxes should have been $48,000, although $82,000 was levied against it, no injunctive relief could be afforded since equity follows the law and the quantum of constructive fraud would not satisfy the level established in the foregoing decisions. Certainly a rule of law depriving a taxpayer of a remedy for a $34,000 overassessment on top of a just tax of $48,000 does not square with the intent of §1341 that a plain, speedy and efficient remedy be available in the state courts. The District Court so concluded, App. 15a.

The dissent of Judge Swygert recognizes the uncertainty of equitable relief in Illinois, stating, App. 6a, that it is:

> ". . . a mere prediction that certain language in very recent supreme and appellate court decisions in that state will be read broadly so as to bring Appellee's claim within an exception to the general rule that taxpayers in Illinois must pay an assessed tax under protest in order to challenge the validity of the assessment. In order to reach such a result an Illinois court would have to find that 1) the assessment here

is 'fraudulently excessive,' and 2) the Illinois remedy of payment under protest is not adequate where one cannot afford to make such payment. I do not think either finding approaches a certainty within the contemplation of section 1341."

In fine,[13] we submit that the majority of the Court of Appeals have misapprehended dicta and negative inferences as the law of Illinois and have relegated plaintiff to this uncertainty. The practice of law should not be a "lady or the tiger" selection. Nor should prescience have been demanded of counsel in 1973 to determine what the law might be thereafter. The majority admit the thrust of *Hillsborough* v. *Cromwell*, 326 U.S. 620, 625-7 (1946) that an uncertain remedy is not plain, speedy or efficient. See also *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101, 105 (1944). By vacating the injunction and dismissing the case, the Seventh Circuit leaves plaintiff in the hapless posture of having to file in the state courts and therein obtain a temporary injunction prior to the time the mandate issues, at best an uncertain and risky procedure and an impossible one if bond is required. If the State injunction does not issue, the Collector, under an order of sale, will forthwith sell the taxes and any relief

[13] Plaintiff's complaint also sought declaratory relief, 28 USC §2201. The efficacy thereof "whether or not further relief is . . . sought" manifestly would occasion concern on the part of the defendants and undoubtedly move them to rectify abuses in the taxing process, especially since the court, in its discretion, might grant substantive relief in the form of money damages in a declaratory action. *Freed* v. *The Travelers, Inc.*, (C.A. 7, 1962), 300 F.2d 395. Because points we would argue *contra* dismissal of the declaratory claim are contained in the two sections of our argument, it would render the petition prolix to include a separate section thereon.

whatsoever is forever denied to plaintiff and a forced sale of its property is its only possible course of action.

CONCLUSION

We thus respectfully submit that the Seventh Circuit has decided important and timely issues affecting basic constitutional rights in conflict with applicable decisions of this Court; that there has been no decision of this Court regarding applicability of 42 USC §1983 to discrimination in tax assessments, a question of current vital, national interest; and, therefore, that the writ should issue to settle the law in "this significant test case".

Respectfully submitted,

James L. Fox,
Counsel for Petitioner.

Moses, Gibbons, Abramson & Fox
Of Counsel

APPENDIX A

No. 74-1179

28 EAST JACKSON ENTERPRISES, INC.,

Plaintiff-Appellee,

vs.

P. J. CULLERTON, Individually and as Cook County Assessor, and BERNARD J. KORZEN, Individually and as Treasurer and Ex-Officio Collector of Cook County,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 C 2876
THOMAS R. MCMILLEN, *Judge*

ARGUED SEPTEMBER 13, 1974 — DECIDED AUGUST 8, 1975

Before FAIRCHILD, *Chief Judge*, SWYGERT and SPRECHER, *Circuit Judges.*

FAIRCHILD, *Chief Judge*. *Plaintiff*, 28 East Jackson Enterprises, Inc., owns a long-term leasehold interest in an office building in downtown Chicago and is obligated to pay the real estate taxes on the property. Defendant Korzen, Treasurer and ex-officio Collector of Cook County, levied $82,925.52 in real estate taxes against plaintiff's property. Plaintiff, allegedly lacking the funds and ability to borrow funds to pay the taxes, brought this civil rights action under 42 U.S.C. §1983 to enjoin Korzen from making an application for judgment and order of sale of the property for nonpayment of the 1972 levy. Federal jurisdiction was alleged to rest on 28 U.S.C. §1343(3) and 28 U.S.C. §1331.

The gist of the claim is that plaintiff's 1972 real estate assessment was fraudulently excessive in that plaintiff's property was assessed at 70 percent of fair cash value while property in Cook County was generally assessed

at 25 percent and that such a disparity violated the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution, Art. IX, §4(a) of the Illinois Constitution, and §501 of ch. 120, Ill. Stat. Ann. (Smith-Hurd Supp. 1975-76).[1] At no time have these issues been presented to an Illinois court.

Plaintiff sought a preliminary injunction, and the defendants filed a motion to dismiss for lack of jurisdiction and failure to state a claim. Before the district court ruled on the motions, the Circuit Court of Cook County, on the defendant Korzen's application, entered judgment and order of sale against plaintiff's property. Plaintiff amended its complaint to enjoin the state court ordered tax sale. After a hearing, at which defendants did not rebut plaintiff's claim but chose to rely on their jurisdictional defenses, the district court granted plaintiff preliminary injunctive relief. Defendants brought this interlocutory appeal pursuant to 28 U.S.C. §1292(a)(1). We reverse.

Plaintiff's complaint, fairly read, seeks solely to suspend or restrain the collection of its 1972 real estate taxes.[2] As such, it must withstand a jurisdictional chal-

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[1] At Illinois law plaintiff's claim is recognized as a claim sounding in constructive fraud. If a taxpayer can prove that his property is assessed at a value disproportionately higher than similarly situated properly, the assessment is deemed fraudulent. See, *e.g.*, *People ex rel. Skidmore* v. *Anderson*, 56 Ill.2d 334, 307 N.E.2d 391 (1974). If the taxpayer prevails, his taxes are reduced "to the amount they would have been had other locally assessed property been assessed at the same percentage of value as that of the objector." *People ex rel. County Collector* v. *Amer. Refrig. Co.*, 33 Ill.2d 501, 505, 211 N.E.2d 694, 697 (1965).

[2] In addition to injunctive relief, plaintiff requests damages and a declaratory judgment that all of its taxes in excess of $30,400 are unconstitutional and void. Although there is an argument that 28 U.S.C. §1341 does not bar a federal court from issuing declaratory relief, 1A, pt. 2, J. Moore, Moore's Federal Practice ¶0.207 at

lenge under 28 U.S.C. §1341 if this action is to be maintained. See, *e.g.*, *Miller* v. *Bauer, et al.*, No. 74-1138 (7th Cir., June 2, 1975). That statute provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state.

Section 1341 codifies the well-established federal policy of noninterference in matters of state taxation. *Great Lakes Dredge & Dock Co.* v. *Hoffman*, 319 U.S. 293, 298-99 (1943). "The scrupulous regard for the rightful independence of state government which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may preserved without it." *Matthews* v. *Rogers*, 284 U.S. 521, 525 (1932).

Defendants contend that Illinois provides plaintiff "plain, speedy and efficient" remedies to challenge the lawfulness of its tax bill. The standard Illinois remedy for objecting to a real estate tax bill is payment under protest and claim for refund pursuant to Ill. Ann. Stat., ch. 120, §675 (Smith-Hurd Supp. 1975-76).[3] But this

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[2] (Continued)

2285 (4th ed. 1974), and the Supreme Court has declined expressly to decide the question, *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 299 (1943), we see no reason to treat declaratory and injunctive relief differently in this context. See *Perez* v. *Ledesma*, 401 U.S. 82, 127-28, n. 17 (1971) (opinion of Brennan, J.). Nor do we think the damage allegations alter the true nature of this lawsuit. The amended complaint contains only the general type of averments of wilfulness, recklessness, and malice found insufficient to show a purposeful discrimination between persons or classes of persons. *Snowden* v. *Hughes*, 321 U.S. 1, 9-10 (1944).

[3] Taxpayers living in Cook County may also challenge real estate assessments in administrative proceedings by filing an application for revision with the County As-

remedy requires that the taxes be paid in full before the taxpayer's claim will be considered. *Id.* at §716. In view of the district court's express finding that plaintiff did not have and could not borrow sufficient funds to pay the full tax, this remedy is not available in this case.[4]

Alternatively, defendants contend that plaintiff can pursue equitable relief in the Illinois courts. A remedy by injunction is a plain, speedy and efficient remedy within the meaning of 28 U.S.C. §1341. *Kiker* v. *Hefner*, 409 F.2d 1067, 1070 (5th Cir. 1969). In response, plaintiff asserts that such relief is unavailable, or uncertain, in the Illinois courts.

Plaintiff relies heavily on language in *Clarendon Associates* v. *Korzen*, 56 Ill.2d 101, 107, 306 N.E.2d 299 (1973), that Illinois courts will no longer consider a constructively fraudulent assessment as an independent ground for equitable relief. As we read the opinion, however, the court decided that whenever the statutory remedy was an adequate remedy, a taxpayer did not have the choice of injunctive relief. The Illinois Court quite clearly states that, "There will be cases of fraudulently excessive assessments *where the remedy at law will not*

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[3] (Continued)

sessor. Ill. Ann. Stat., ch. 120, §579 (Smith-Hurd Supp. 1975-76) or presenting a complaint before the county Board of Appeals. *Id.* §§593-606. Plaintiff's complaint alleges that relief before the Cook County Board of Appeals was sought, but that the Board ordered no change in the assessment.

[4] Taxpayers are not entitled to interest on a refund of taxes paid under protest under Ill. Stat. Ann., ch. 120, §§675, 716 (Smith-Hurd Supp. 1975-76). *Lakefront Realty Corp.* v. *Lorenz*, 19 Ill.2d 415, 422-23, 167 N.E.2d 236, 240-41 (1960). Plaintiff has argued that this renders the statutory remedy inadequate. See *United States* v. *Department of Revenue of State of Ill.*, 191 F.Supp. 723, 726-27 (N.D. Ill. 1961), *vacated on other grounds*, 368 U.S. 30. Since this remedy is not otherwise viable in this case, we express no opinion on this point.

be adequate and injunctive relief should then be available." 56 Ill.2d at 108, 306 N.E.2d at 303 (emphasis supplied). Accord, *LaSalle Nat'l Bk.* v. *County of Cook*, 57 Ill.2d 318, 312 N.E.2d 252 (1974); *Hoyne Savings & Loan Association* v. *Hare*, 60 Ill.2d 84, 322 N.E.2d 833, 836 (1974). Since the legal remedy considered adequate in *Clarendon* was the statutory remedy of payment under protest, it follows that when that remedy is unavailable, as in the present case, an action for an injunction will lie.

This reasoning is fortified by the policy analysis in the *Clarendon* opinion. In Illinois there is no requirement that taxes be paid in full before an injunctive suit may be instituted. Therefore, the Illinois court reasoned, if taxpayers could choose between injunctive relief and the statutory remedy of payment under protest, they would pursue the injunctive remedy to delay payment of the taxes. To permit such a choice would impair the collection of state revenues and undermine the purpose of the statutory remedy. 56 Ill.2d at 108, 306 N.E.2d at 303. In the instant case these considerations are not operative. Here, the taxpayer is not seeking equity to delay payment of the taxes; he is seeking equity because he has no other recourse.

Our view of the Illinois law is further supported by the recent opinion in *Exchange National Bank* v. *Cullerton*, 17 Ill. App.3d 392, 308 N.E.2d 284 (1974). There, a taxpayer appealed the dismissal of an action seeking to enjoin the collection of an allegedly excessive assessment, asserting, though he had failed to allege it in his complaint, that equitable relief was appropriate because he lacked the funds to pay the taxes under protest. In affirming the dismissal, the appellate court suggested that the complaint would not have been dismissed had it alleged the taxpayer's inability to pay the taxes. 17 Ill. App.2d at 395, 308 N.E.2d at 286-87.

Finally, the Illinois Supreme Court has been willing to grant equitable relief even in instances in which the statutory remedy was available and the tax was neither

unauthorized nor levied against exempt property. In *Hoyne Savings & Loan Association* v. *Hare*, 60 Ill.2d 84, 322 N.E.2d 833 (1974), the taxpayer sought and was granted equitable relief for fraudulent assessment where particular circumstances persuaded the Court that it would be unfair and unjust to require that relief be sought through the statutory remedy.

We recognize that if the adequacy of a state remedy is uncertain, section 1341 does not divest the federal courts of jurisdiction. *Hillsborough* v. *Cromwell*, 326 U.S. 620, 625-26 (1946). But we believe that it is reasonably certain that Illinois courts would entertain a suit for injunction when a taxpayer establishes that he lacks the funds to comply with the statutory remedy of payment under protest. Under such circumstances, the principles of comity and restraint embodied in section 1341 require that plaintiff first seek equitable relief in the Illinois courts.

Accordingly, the order appealed from is reversed and the cause is remanded with directions to dismiss the complaint for lack of jurisdiction.

REVERSED.

SWYGERT, *Circuit Judge*, dissenting in part. While I agree that principles of comity and restraint weigh heavily in favor of this court staying its hand in this case, I cannot agree that it *must* do so for lack of jurisdiction. Section 1341 does not apply when the existence or adequacy of a state remedy is in doubt or uncertain. *Hillsborough* v. *Cromwell*, 326 U.S. 620, 625-26 (1946). While it appears "reasonably certain" to the majority that Illinois courts will entertain a suit for injunctive relief by the appellee, this is in reality a mere prediction that certain language in very recent[1] supreme and ap-

[1] Significantly, the decisions in *Exchange National Bank* v. *Cullerton*, 17 Ill. App. 3d 392, 308 N.E.2d 284 (1974) and *Hoyne Savings & Loan Assoc.* v. *Hare*, 60 Ill.2d 84, 322 N.E. 2d 833 (1974) were rendered after the

pellate court decisions in that state will be read broadly so as to bring appellee's claim within an exception to the general rule that taxpayers in Illinois must pay an assessed tax under protest in order to challenge the validity of the assessment. In order to reach such a result an Illinois court would have to find that 1) the assessment here is "fradulently excessive," and 2) the Illinois remedy of payment under protest is not adequate where one cannot afford to make such payment. I do not think either finding approaches a certainty within the contemplation of section 1341.

It therefore seems to me that the district court has jurisdiction to enjoin the sale of appellee's property. But this does not necessarily mean that such an injunction is proper or justified. Independent of section 1341, principles of comity and the greater public interest must be carefully considered in deciding whether in a given case a federal court of equity should interfere in a matter involving the collection of taxes under state law. *Cf. Great Lakes Co.* v. *Huffman*, 319 U.S. 293, 297-301 (1943). In this particular case it may well turn out that Illinois courts will provide an adequate remedy for appellee by entertaining its suit for injunctive relief. At least it would seem incumbent on it to seek state relief prior to resorting to the federal forum. I would therefore remand this case to the district court with instruction that it vacate its injunction and abstain from any further action in this matter pending submission of appellee's claims to an Illinois forum. I would further direct the district court to retain jurisdiction in this case until appellee has either obtained his remedy in that forum or shown an effective denial of such a remedy.[2]

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[1] (Continued)

district court entered its injunction. *See Spector Motor Service* v. *O'Connor*, 340 U.S. 602, 605 (1951); *Dawson* v. *Kentucky Distilleries Inc.*, 255 U.S. 288, 295-96 (1961).

[2] Since judgment has already been entered against the property, retention of jurisdiction would assure that if

UNITED STATES DISTRICT COURT

Northern District Of Illinois

Eastern Division

28 EAST JACKSON ENTERPRISES, INC., *Plaintiff*,

v.

P. J. CULLERTON, Individually and as Cook County Assessor, and BERNARD J. KORZEN, Individually and as Treasurer and ex-officio County Collector of Cook County, *Defendants*.

No. 73 C 2876

PRELIMINARY INJUNCTION

This cause came on to be heard on plaintiff's motion for a preliminary injunction to enjoin the defendant Korzen from selling plaintiff's real estate for 1972 taxes. The court heard evidence submitted by the plaintiff, and the defendants offered none. They rely on their motion to dismiss for lack of jurisdiction and upon the "integrity of the tax bills." Other legal defenses are raised in their written argument and have been considered. We find and conclude that plaintiff is entitled to a preliminary injunction until further order of this court.

On the issue of Federal jurisdiction, the court has already ruled in favor of the plaintiff in an earlier case between these same parties (No. 72 C 1373). The levy-

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[2] (Continued)

state law does not contemplate equitable relief under these circumstances, the district court could take appropriate action with dispatch so as to avoid a preemptive sale of the property. I would also note my view in this regard that the majority opinion does not preclude a later resort to the federal courts in this case should it become clear that, contrary to the prediction of the majority of our panel, Illinois courts decline to entertain a suit for injunctive relief by the appellee.

ing of taxes which have a discriminatory effect between taxpayers can violate the equal protection clause of the 14th Amendment to the Constitution of the United States. See *Sunday Lake Iron Co.* v. *Wakefield*, 247 U.S. 350 at 352 (1918). This affords the court jurisdiction under 28 U.S.C. §1343 and 42 U.S.C. §1983.

The plaintiff does not have a speedy and efficient remedy under the laws of the State of Illinois. Hence 28 U.S.C. §1341 is no impediment to an injunction. We will not repeat the reasons for this as stated in our decision in 72 C 1373 entered January 23, 1973. Thus the only new question raised by plaintiff's motion is whether it has shown by the evidence that it is entitled to preliminary equitable relief by way of an injunction.

We find and conclude that plaintiff very likely will be irreparably damaged if a preliminary injunction is not entered before its leasehold is sold for taxes on January 24, 1974. Plaintiff has testified without contradiction that it has no funds with which to pay its 1972 tax. It is likewise undisputed in the evidence that plaintiff cannot borrow this amount, presumably because its sole asset is a lease which is subject to termination upon a tax sale. Termination of the lease would leave plaintiff with no assets or remedy except by means of the instant lawsuit, and it would probably be deprived of the financial ability to carry forward the lawsuit.

We also find and conclude that plaintiff has a reasonable likelihood to prevail ultimately. The evidence shown that its property was taxed at 68% of cash value in 1972 when real estate generally in Cook County was being taxed at 27% of full value. This violated Sec. 501 of Chapter 12 of the Illinois Revised Statutes and apparently violates Art. IX, Sec. 4(a) of the Illinois Constitution of 1970. The defendants have not put these facts at issue by evidence or by filing an answer to the complaint or to the motion for a preliminary injunction, preferring to rest solely upon issues of law. They assert in their Argument that the Cook County Assessor

has been following a system of classification and that plaintiff has not shown that its property is taxed discriminatorily within its own class. However, the evidence does not show any system of classification either in 1972 or before, but it does show a variation from approximately 20% to 42% in the assessment of different kinds of real estate in Cook County compared to their fair market value.

Just what defendant believes to be plaintiff's speedy and efficient remedy in the State Court escapes us. Plaintiff no longer has the legal right to pay its taxes under protest, and its evidence is undisputed that it lacked the financial ability to do so at any time after the 1972 taxes were assessed. Furthermore this has been termed a "cumbersome and ponderous process" by the Illinois Supreme Court in *People ex rel. Kohorst* v. *G.M. & O.R.R. Co.*, 22 Ill. 2d 104, 109 (1961). Even if it could have paid under protest, we have previously held that the disparity between the current interest rate and the defendants' refusal to pay any interest on taxes paid under protest deprives plaintiff of the kind of remedy contemplated by Sec. 1341. See our opinion in No. 72 C 1373 referred to above.

The question of comity between the Federal and County jurisdiction is not as dramatically presented in the case at bar as it was in the class action previously upheld by this court in *Biasco, etc.* v. *Cullerton, et al.*, 72 C 1224. The amount of taxes assessed against plaintiff is a miniscule proportion of the County's tax revenue (allegedly .008%), and the entry of a preliminary injunction will have no discernible effect on the performance of its governmental functions. See also the numerous instances where Federal courts do intervene in state proceedings recently reviewed by Justice Douglas, dissenting on another point, in *O'Shea* v. *Littleton*, ... U.S. ....., 42 U.S.L.W. 4139 at 4146 (1974). We believe that the slight deprivation suffered by the taxing body by the issuance of a preliminary injunction is outweighed by the desirability of arriving at a final decision in this significant test case.

We have considered the possibility of requiring plaintiff to post a bond for the amount of its taxes pending the outcome of this case. This has not been requested by the defendants, and we will not require one on our own motion, because it appears from the evidence that plaintiff has ample assets to guarantee the payment of its 1972 taxes with interest if this is the final outcome of this lawsuit. On the other hand, we are not going to enter an injunction pending the final outcome of this case because the defendants may wish to offer evidence on factual issues which have so far been uncontested. We see no reason why this case and No. 72 C 1373 cannot be tried on their merits within the next few months.

It Is Therefore Ordered, Adjudged And Decreed that defendant Bernard J. Korzen, Individually and as Treasurer and ex-officio County Collector of Cook County is enjoined from selling plaintiff's property designated as index nos. 1715 104 020 and 021 for the 1972 real estate taxes until further order of this court.

ENTER:

/s/ Thomas R. McMillen
Thomas R. McMillen
Judge, U. S. District Court

Dated: January 23, 1974

UNITED STATES DISTRICT COURT

Northern District Of Illinois

Eastern Division

BIASCO MUSICAL INSTRUMENT CO., an Illinois corporation, et al.,
Plaintiffs,

v.

P. J. CULLERTON, individually and as COOK COUNTY ASSESSOR, BERNARD KORZEN, individually and as TREASURER AND EX-OFFICIO COUNTY COLLECTOR OF COOK COUNTY, et al,
Defendants.

No. 72 C 1224

and

CONSOLIDATED

28 E. JACKSON ENTERPRISES, INC., an Illinois corporation, et al,
Plaintiffs,

v.

P. J. CULLERTON, individually and as COOK COUNTY ASSESSOR, BERNARD KORZEN, individually and as TREASURER, AND EX-OFFICIO COUNTY COLLECTOR OF COOK COUNTY, et al,

No. 72 C 1373

DECISION and ORDER

These two related cases are brought by owners of commercial real estate in Cook County, Illinois. They challenge the 1971 tax assessments in which the defendants participated in various ways, and allege violations of plaintiffs' constitutional rights to equal protection and to due process. Thus the suits are brought as civil rights actions under 42 U.S.C. §1983. Defendants have filed motions to dismiss for failure to state a claim and for other reasons, thereby admitting the well-pleaded allegations of the Complaints for the purpose of their motions.

The Complaint in No. 72 C 1224 alleges that plaintiff's property was taxed at 155% of its fair cash value in 1971 which was approximately 3.7 times the level at

which property generally is taxed in that County. The Complaint is filed on behalf of a class consisting of that 25% of the owners of real estate parcels in Cook County who allegedly are in the same predicament as the plaintiff. Case No. 72 C 1373 is filed by a single taxpayer alleging that its property was taxed at 100% fair cash value but that other property in Cook County is taxed at an average of 42.93% of fair value and that this plaintiff pays 2.3 times more than it would if all property were assessed at 100%.

By suing for money damages against the Cook County Assessor and other County officials and their sureties, *inter alia*, plaintiffs seek to avoid the limitation imposed on Federal courts by 28 U.S.C. §1341 which provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The specific prohibition of Section 1341 has been recently expanded to Complaints seeking money damages pursuant to the doctrine of abstention. *Hutter* v. *Cook County, Illinois*, ... F.2d ....., (7th Cir., #72-1316, decided October 10, 1972). In that case the dismissal of a class action against the assessor for damages was affirmed primarily on the ground of comity. The Court of Appeals concluded that the plaintiff taxpayer had an adequate remedy under Illinois law and that the Federal courts might unnecessarily interfere with the local government's operation if it accepted jurisdiction of his Complaint. That court also added that "there is no discernible pattern of prejudice against the taxpayer" [citations omitted].

A leading statement on the subject of comity in state tax matters appears in *Matthews* v. *Rodgers*, 284 U.S. 521 at 525-6 wherein Justice Stone wrote:

> The scrupulous regard for the rightful independence of state governments which should at all times

> actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, . . ., or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present [citations omitted]

In the cases at bar, plaintiffs have raised two issues which we believe distinguish their complaints from the one considered in *Hutter*. They claim that the remedy available in the Illinois courts is not complete and adequate because interest is not allowed on any tax refund which may eventually be obtained. *Lakefront Realty Corp.* v. *Lorenz*, 19 Ill.2d 415 (1960). Since it could require several years to recover any overpayment, plaintiffs would be deprived of the use of their money for a long period of time. The cumulative effect of this lack of interest, aggravated by the decrease in the value of money caused by inflation, results in a substantial deprivation of property under the Illinois system of tax refunds. The class action, if proper, would involve great sums of the plaintiffs' money used by defendants without interest.

The deprivation of interest has been held to constitute an inadequate remedy by a divided three-judge court in *United States* v. *Livingston*, 179 F.Supp. 9 (E.D.S.C. 1959), *aff'd per curiam* 364 U.S. 281 (1960). That court enjoined the State of South Carolina from collecting a sales tax on sales by the Dupont Company to the Atomic Energy Commission. Judge Haynsworth relied on several cases illustrating the inadequacy of the state court

remedy in the absence of interest, including *Hopkins* v. *Southern California Telephone Co.*, 275 U.S. 393 (1928).

A second feature of the Complaints in the cases at bar is their claim that Illinois courts will not review real estate assessments except in the event of fraud. In Case No. 72 C 1373, plaintiff does not contend that its property is over-assessed; thus this taxpayer has no statutory remedy by which to complain about its own taxes. It has the right to file complaints with the defendant Board of Tax Appeals against the allegedly under-assessed parcels, but this is not an efficient remedy in view of the fact that over a million parcels are allegedly involved.

Plaintiffs do not allege actual fraud but wish to try to prove constructive fraud pursuant to the dicta contained in such cases as *People ex rel. Frantz* v. *M.D.B. K.W., Inc.*, 36 Ill.2d 209 at 211 (1966). The Illinois courts have seldom if ever found constructive fraud in tax assessment cases, having recently held it to be lacking in an over-assessment of approximately 70%. *People ex rel. Munson* v. *Morningside Heights, Inc.*, 45 Ill.2d 338 (1970); cf. *People ex rel. Town of Cicero* v. *Sweitzer*, 339 Ill. 28 (1930). The plaintiff in No. 72 C 1224 alleges a 55% over-assessment and plaintiff in No. 72 C 1373 alleges no over-assessment. Neither of these claims constitute constructive fraud under the Illinois decisions, but the result when other parcels are allegedly taxed at a much lower rate certainly seems to justify a hearing to determine the facts. The lack of an opportunity to effectively challenge a discrepancy of this magnitude in the state courts deprives the plaintiffs of the constitutional rights alleged in the Complaints. In short, both plaintiffs have stated a cause of action under Section 1983 for which they do not have a plain, speedy and efficient remedy in the state courts of Illinois.

The question remains whether this court should abstain, as was done in *Hutter*. The features which dis-

tinguish the cases at bar from *Hutter*, as stated above, have satisfied this court that plaintiffs have alleged a violation of their constitutional rights which is not adequately remedied in the State courts. We do not view this as a case where the Federal courts may create an unseemly conflict between two sovereignties or may unnecessarily impair state functions (*Martin* v. *Creasy*, 360 U.S. 219 (1958)) but rather a case where plaintiffs haved alleged a Federal cause of action which can perhaps only be remedied here. Cf. *Brown* v. *Board of Education*, 349 U.S. 294 (1955) and *Baker* v. *Carr*, 369 U.S. 186 (1962). Disparity in the administration of tax laws can cause chronic and perhaps irremediable blight in a large metropolitan area such as Cook County. Therefore, as was said in *Zwickler* v. *Koota*, 389 U.S. 241, n.4 (1967), the "better practice" is to retain jurisdiction.

Government officials such as the defendants have been answerable for their wrongful acts since at least *Monroe* v. *Pape*, 365 U.S. 167 (1961). Also plaintiffs' property rights are now subject to the protection of Section 1983. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972). Defendant Lehnhausen filed a separate motion to dismiss on the ground that no claim is stated against him. As Director of the Illinois Department of Local Governmental Affairs, he has a statutory duty to see that all assessments of property are relatively just and equal (*Ill. Rev. Stat.*, (1971), Ch. 120, §611(1) and §621). Since his own published documents allegedly show that the Cook County assessments are not just and equal, he is a proper party defendant in a civil rights action.

In addition to their civil rights action, plaintiffs in Counts III and IV have alleged violations of certain Illinois statutes and certain provisions of the Illinois Constitutions. Under the circumstances, these counts are proper pendent claims. Furthermore, the more expansive approach to Federal jurisdication taken by some courts permits the surety companies which indemnify the public officials to be added as proper parties defen-

dant, since they can be sued directly under Chapter 103, Section 13 of the *Illinois Revised Statutes*. Cf. *Leather's Best, Inc.* v. *S. S. Mormaclynx, et al.*, 451 F.2d 800 (2nd Cir. 1971).

Plaintiffs in case 72 C 1373 have pleaded Counts V and VI which do not appear in the class action No. 72 C 1224. These last two counts seem to be an attempt to articulate some of the theories which we have held above to be implicit in the other counts. The complaints without these two additional counts are already too prolix to constitute a "short and plain statement" of the plaintiffs' claim. Therefore we will grant the motion to dismiss Count V and VI of Case 72 C 1373, with leave granted to amend the remaining portions of the Complaint to incorporate any portions of these counts elsewhere if deemed necessary.

The foregoing rulings merely mean that the plaintiffs have stated "a claim upon which relief can be granted." This should not be taken to mean that all of the claims or all of the relief prayed for are necessarily proper. At this stage of the proceedings, however, we sustain both complaints against all defendants.

It Is Hereby Ordered, Adjudged And Decreed that defendants' motions to dismiss the complaints are denied except as to Counts V and VI of Case 72 C 1373, and plaintiffs are granted leave to amend their complaints within five (5) days hereof. Defendants are ordered to answer both Complaints within twenty (20) days hereof. This case will be called for a report on status on February 20, 1973 at 10 a.m.

[redacted]r:

/s/ Thomas R. McMillen
Thomas R. McMillen
Judge, U.S. District Court

Jan. 23, 1973